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ST. LOUIS, MO., JANUARY 12, 1912.

JURISDICTION OF FEDERAL COURTS AS TO A MUNICIPAL ORDINANCE ALLEGED TO BE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

It may be remembered that about a year ago—to be precise, on February 6th, 1911—the Ninth Circuit Court of Appeals, Gilbert, Ross and Morrow, C. JJ., sitting, and the opinion being rendered by the last-named, held, unanimously, that a citizen or corporation resident could not invoke the jurisdiction of a federal circuit court upon the ground that a municipal ordinance affecting his or its rights was violative of the Fourteenth Amendment, where it was also alleged to be violative of the State Constitution. Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421. This ruling is confirmed in the case of City and County of San Francisco v. United Railroads, 190 Fed. 507, by the same court, Gilbert and Morrow, C. JJ., concurring and Hanford, D. J., dissenting.

Judge Hanford, in a brief opinion, expresses his dissent from the principle that: "a party complaining of an invasion of rights guaranteed by the Constitution of the United States and also in violation of the Constitution or laws of the state 'must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort' before he will be entitled to invoke the jurisdiction of a federal court."

The reason why he dissents is thus expressed: "The federal courts ordained and established pursuant to the Constitution of the United States have an important function in adjudicating controversies involving questions of national law, and the jurisdiction of the United States Circuit Courts in actions at law and suits in equity, if not exclusive, is concurrent with, and not secondary to the jurisdiction of state courts. I consider that a United States court has no right to deny its jurisdiction, in a case where jurisdiction is conferred by Congress, merely because of a presumption that the rights of the complainant will be fully protected by a state court, or on a review of its decision by the Supreme Court of the United States."

This dissent exhibits, it appears to us, a prevalent notion among some federal judges about the importance of federal courts, so industriously asserted as to bring about an obscuration or eclipse of legal acumen. It was held by the court in the case in which the ruling dissented from was made, that, as the fourteenth amendment refers to "state aggression only," an ordinance by a municipality of the state cannot be assailed in the federal courts, until it has been demonstrated to "have been enacted in the exercise of some legislative power conferred by the state in the premises."

In other words, the Circuit Court of Appeals held that jurisdiction was dependent upon state action, not action by a municipality, depriving such citizen or corporation of due process of law, and this could not be affirmed, until the court of last resort in a state had sustained an ordinance claimed to be violative of the fourteenth amendment. Whether the Ninth Circuit Court of Appeals is right or wrong in saying that a sufficient jurisdictional averment cannot be made as to a municipal ordinance being violative of the Fourteenth Amendment, until it is first shown to be state action was the only question for consideration. Whatever the dignity and importance of inferior federal courts, and whether their jurisdiction be exclusive or concurrent, it is, at least, true, that they possess no jurisdiction whatever except it be expressly conferred.

In the prior decision rendered by the Ninth Circuit Court of Appeals, no very extended reference is made to the case of Memphis v. Cumberland Telephone Co., 218 U. S. 624, 31 Sup. Ct. 115, but it is treated more at large in the case wherein the dissent was filed, and there claimed as settling the question.

In the Memphis case there was the requi-

site diversity of citizenship, but the question was whether there was any appellate jurisdiction of the supreme court in direct appeal from a circuit court. This right of direct appeal depended upon "whether a right under the Constitution and laws of the United States was duly claimed during the case." The only claim of such right was that it had been held that the municipal legislation complained of violated the federal constitution. The court, by a majority of five to three, held that, where such legislation was without power and a usurpation of authority and these allegations "can, consistently with the other averments of the bill, be referred only to the State Constitution, which as well as the Federal Constitution, inhibits attempts to take property without due process of law," then no federal question is raised.

Does this decision cover the ruling by the Circuit Court of Appeals? It seems to us that it does not, as a further excerpt from the opinion shows. Thus Justice Day says: "It is suggested that the bill, when properly construed, may have a two-fold aspect, one which charges that the city acted without authority of law and the other that, conceding the city to act with authority, the rates fixed were confiscatory, in violation of the Federal Constitution. Assuming that a bill might be framed in this manner, it is sufficient to say of the present bill it is not one of that character. There is nothing in it qualifying the allegation as to the action of the city without authority of the state, and as we have said, the allegations as to the confiscatory character of the ordinance are to be referred, as they can be consistently with the other allegations of the bill, to the State Constitution, which would be violated, if such allegations were true."

Then the justice mentions the fact that the only reference to the Federal Constitution is in the final opinion by the Circuit Judge who said the rates were in violation of the Federal Constitution. But this mere reasoning by the judge was not determinative of what was the question involved.

It would seem, therefore, that this case is against the ruling by the Circuit Court of Appeals. The inference, therefrom, is that had it also been averred, specifically, that a right under the Federal Constitution had been violated, a federal question would have been considered raised, notwithstanding it was also averred the ordinance was void under state law.

Certainly it is not to be supposed, that confiscatory rates may ever be considered as sanctioned by state law, but, if there is an allegation of such rates, that *ipso facto* raises a question of federal law. The Memphis case said every allegation in the bill was referable solely to the State Constitution, but an allegation which also refers to the Federal Constitution cannot be considered of that character.

The dissenting opinion by Justice (now Chief Justice) White, concurred in by Justices McKenna and Hughes, confirms, we think, this view. He argues from analogy as to writs of error from state courts of last resort, as to which it appears, that decision merely taking into account a federal question gives the right to such a writ.

It, however, may be plausibly argued, that, where the claim is necessary to be made for jurisdictional purposes, it has to be specifically stated. But it must be confessed, we think, that little support is given to the decision by Ninth Circuit Court of Appeals by the decision in the Memphis case; and, yet, it seems to rely on that very greatly.

NOTES OF IMPORTANT DECISIONS

TAXATION — RULE OF DOMICIL OF OWNER APPLIED TO SEA-GOING VESSELS. —In Southern Pacific Co. v. Kentucky, 32 Sup. Ct. 13, it was sought to apply the decision in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, so as to take from the domicil of the owner of vessels the right of taxation, where the vessels were enrolled at New York and plied between ports situated elsewhere than in or near that domicil.

It was held that enrollment is not of itself

determinative of the place of taxation, as there is merely the right given to the owner to mark on the stern of his vessel the place of enrollment, of building or where the owner resides.

Then it is said the maxim for taxation that movables follow the domicil of their owner has only an exception in the owner giving to movables permanent location elsewhere. It is said a vessel is built for navigation and making ports is a mere incident in navigation and if one port could tax it another might, or there would be elements of uncertainty, which would free it from taxation altogether. If however a vessel's navigation were in inland waters, the state where those waters were could tax the vessel, irrespective of its owner's domicil.

This was said to be all, in effect, decided in the Refrigerator Company case, which concerned rolling stock of a railway.

The court says in the principal case: "It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular state, and quite another to attribute to a sea-going ship an actual title at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas."

An element also figuring in this conclusion, that the vessels should be taxed in Kentucky, though never intended to go there, seems to be that vessels touching ports in this country "are engaged in the business and commerce of the country, upon the highway of nations," and different ports, one contending with another should not be allowed to interfere with them.

Thus our system of government has an influence in applying the old maxim mobilia sequuntur personam. We think it somewhat regrettable, however, that the vigor of the principle seems a little derogated from in argument by the court in saying that it is particularly applicable to a corporation, because that owes its very life to its domicil. If there is any difference between an individual and a corporation owner, in this respect, it would seem to us the maxim would more strongly apply to the former. A state permits a corporation to be chartered, often, when it is intended to carry on business elsewhere, and it has practically no more to do with it. An individual has the constant protection of the laws where he resides. Like the vessel's home, that of such a corporation is a sort of fiction. Its real domicil is where it settles permanently, just as when an individual changes his residence.

FIDELITY BOND—EMPLOYEE BECOMING OWNER OF MAJORITY OF CORPORATE STOCK.—It is to be conceded, that the trend of authority is decidedly towards construction of a bond given by a company in the business of insuring against loss through dishonesty of employee in the same way as is ordinary insurance. The reason for this, however, has never seemed satisfactory to us, no more satisfactory indeed, than applying the same rule of construction in the case of fraternal insurance of which we treated in 73 Cent. L. J. 351.

Why we are unable to understand the rule as to fidelity insurance that, while there is a thoroughly established principle that a surety's contract is strictissimi juris, yet in such insurance it is not to be applied. It is certainly true that the relation such a company bears to a contract is neither more nor less than that of surety, and until a statute engrafts a different understanding upon a surety company's bond its obligation should remain what in law it purports to be. Certainly it would present an anomalous situation, to be, if an employee's fidelity were guaranteed by two or more sureties, if one or more of them were individuals and the other or others surety companies, for these sureties to be classified in construction.

The South Dakota Supreme Court agrees to the rule of which we suggest the above criticism, but it very properly, we think, refused to extend its application to a case within the letter, but not within the spirit, of a surety company's obligation. Farmers' & M. State Bank v. U. S. Fidelity & G. Co., 133 N. W. 247. The bond in the case was where an employee was assistant cashier of a bank. Afterwards upon his acquiring a majority of the bank's stock he became its cashier. The language of the bond under the rule we have criticised was considered to include the position to which the employee had been promoted. But it was thought, that the bond contemplated the employee being under the same kind of supervision and control by the directors. Such supervision and control was held, necessarily, affected by the acquirement by the employee of a majority of the bank's stock, this circumstance not coming to the knowledge of the surety company, until it was called to indemnify the bank for the employee's dishonesty as cashier. Certainly it would seem that this changed situation

ought to have been made known to the company.

The fact that it was known that this situation could well occur through sale of bank shares does not seem sufficient answer to the court's ruling, because it is obvious that with an acquirement of a controlling interest the employee was not in the position of dependency that he was formerly.

CONTINENTAL AND COMMON LAW PROCEDURE CONTRASTED—AN INTERESTING SIDE-LIGHT ON REFORM IN PLEADING AND PRACTICE.*

PART I.

"Dr. Schwerin" is Introduced.—Sometime last summer, I dropped into the Lawyers' Club, of Philadelphia, why, I don't know, except it was a wish to have a quiet hour, undisturbed by other men.

But as it happened, I was not the only one who had come there, evidently with the same purpose in mind. The first man my eye lighted on, was his Honor, Judge Arthur B. Black; there he sat, buried in all sorts and conditions of papers, transcripts of evidence, etc., and when I came in, he gave me the same kind of annoyed look, as when one raises a point of law before him, which forces him to look up the authorities. However, he at once recovered his dignity and unruffled appearance, gave me a quiet nod, and once more dug into his papers. I found one of the lighter magazines, full of pictures of actresses and other beauties, dropped into an easy-chair and prepared to have a nice hour of loafing, when in a dark corner I discovered Charles D. White lounging in an arm-chair, his legs stretched as far as they would reach, his head thrown back, and the smoke from his cigar ascending slowly to the ceiling. He had evidently seen me as soon as I came in, had noted the greeting between the judge and myself, and with his usual sarcastic smile, he nodded to me, as if to say: This time the old man will have to work, and he is hard up against it.

However, perfect quiet prevailed, the only noise being that caused by the judge in handling his papers, and I had already gone through the illustrations and descriptions of all the charms of two of the actresses, when suddenly there was quite a noise in the hall, scraping of feet and comparatively loud talking, two men evidently trying to prevail upon each other to enter first. The judge looked up in despair, White looked whimsically at the judge, and I kept my eyes on the door. Presently, in came a very large, blond man with full beard, turned up mustachios, hair rather thin on the forehead, wearing spectacles and quietly but very carefully dressed; right back of him appeared Edward F. Brown, beaming all over, as happy to look at as if he had just won an important case in court. Seeing Brown, the judge knew that further opportunity for work was gone for good; he commenced to roll up his papers, looked at his watch and was evidently preparing to leave. But I knew that Brown would not let the judge escape; and I was right. Dixit Brown: "Judge, it is most fortunate that I should find you here, as well as our critical friend White, not to speak of Advocatus Diaboli. Allow me, gentlemen, to introduce Mr. Karl von Schwerin, Doctor juris from the University of Leipsic, Councillor of Justice of the German Empire, who has been sent by his Government to the United States to study and report upon our judicial system, and who has already been in the country a couple of years, having spent most of his time in New York and the West, but now on his return trip taking in Pennsylvania. Doctor, let me make you acquainted with Judge Black, one of the most prominent and learned judges of our courts of common pleas, Mr. White, a leading member of our bar, and Advocatus Diaboli, against whom I wish to warn you; he says little, but has the reputation of thinking a whole lot." Quoth Judge Black: "Doctor Schwerin, it gives me great pleasure to make your acquaintance. We

naturally feel flattered by being made the subject of study by a lawyer, deemed by his own government most competent to carry it out, but at the same time we cannot but congratulate you that you should have been selected for this task, thereby gaining an opportunity to obtain a more than superficial knowledge of the actual workings of the grandest and most perfect system of remedial law, yet devised by the human mind."

Study of Comparative Systems of Procedure.—While this was being delivered, as if excathedra, we were all kept standing, but now the judge had got into his "important" mood, waved his hand towards the chairs, and we all sat down.

The Doctor, who in the meantime had kept on bowing and smiling, was about to reply to the judge's speech, when up spoke Brown: "I think it most fortunate for us, that Dr. Schwerin should have come here just at the time he did; the "grandest and most perfect system of remedial law,' as the judge calls it, has somehow or other got out of gear; from the Atlantic to the Pacific, from Maine to Texas daily complaints are heard of the law's delays, and innumerable remedies are proposed, but all by men who are in medias res, and therefore cannot have or obtain as free a view of the situation as a lawyer brought up under another and entirely different system; the errand upon which Doctor Schwerin was sent to the United States, the studies which he has pursued since his arrival, assure us that he must have formed an opinion about our system, and it would be immensely interesting to hear what this opinion of a learned, thoroughly qualified foreign lawyer is." White also interrupted and said: "As for myself, I am simply a practicing lawyer; I have mastered, to some extent, our present system; under it I have built up enough of a practice to give me a comfortable income, and a little for a rainy day, and I should hate to see our system radically changed, so as to force me to learn afresh all the details of a new procedure. I have been quite successful in winning most of my cases under the present system, and doubt whether I should succeed as well with a fresh set of tools. However, I have not become sufficiently commercialized to lose entirely my academic interest in law as such, and I too would consider it of great interest to hear, how our way of doing things has impressed you."

It had been quite a study to follow the various expressions on Dr. Schwerin's face while all this talk was going on; always alertly polite, often amused, at times rather bored. He now commenced to speak, and his English was quite good.

Said the Doctor: "This has been extremely interesting to me, and so characteristically American. What I mean is this: here I come with my friend Brown to have a quiet afternoon's chat in a place where, he said, nobody would disturb us, and before I know anything about it, or have even had a chance to say a word, I have been put in a position where I have to give a lecture on law, or be rude in refusing. Now, as to giving you my opinion upon your judicial system, that is a tremendous task. You do not wish me to say whether I find it good or bad, generally speaking; you want me to go into details and give my reasons.

"I do not know how really to attack the problem; our training has been so different, our ways of looking at things are so far apart, that it may be difficult for me to make myself understood. I have probably misunderstood a great many things in your system, and probably you do not know anything about ours. In addition, during my two years' travels in the states, I have visited about twenty of them, and have found about as many systems of procedure, although the differences are mostly in the details.

The "Law's Delay" Not a New or Local Complaint.—"Whatever the system, however, in all the states visited by me, I have heard complaints about the law's delays. But that is universal; when a man has made up his mind about his case, he cannot for

the life of him understand why such a clear case cannot be decided on the spot, and he come into his rights at once; in addition, in all countries, and under all systems, courts have a tendency to fall behind in their work, often aided and abetted by the lawyers. Judges are but human; they draw the same monthly salaries, whether they have had to try ten or a hundred cases, and they are not going to wear the nails off their fingers, in order that any Tom, Dick or Harry may have his decision before going to the seashore. Certain of the law's delays are necessary and unavoidable, but it is true that others are entirely unnecessary and should be done away with.

"Some technicality was introduced into the law some time way back to meet conditions then existing. Generations of lawyers are thereupon brought up with this particular technicality as one of the settled dogmas of their system; at the time when they are taught, they are young, often—at least in America—without any special training in logic or philosophy generally, and they take in this dogma as a matter of course and as a necessary part of the system; later in life they may see that this particular rule has become unnecessary, and works as a delay and hindrance only, but then they have become used to it, it has become part of their tool chest, so to speak, and any practicing lawyer who has mastered his craft, hates, as Mr. White said, 'to have to learn the use of new tools'; a great deal of his acquired experience and advantage over the young man is thereby lost, and in addition, it is a hard job for a man in middle life, both to learn and to unlearn. However, as times and conditions change, law must change with them, and substantive law does not seem to have such a hard time of it in keeping just behind the times, but remedial law, especially where it early attained to a comparative perfection, is apt to be centuries behind, and if you allow me to say so, this seems to be the case with your remedial law.

A Criticism of Pennsylvania Procedure.—"It is necessary for me to be concrete, and I shall, therefore, confine myself, as much as possible, to Pennsylvania law, exclusively. You know that I am a pure dilettante in the matter, and what I know I have learned, not from actual practice, but from reading and listening. Now, why do you have terms of court? Your judges do not ride on circuit, but sit in fixed places all the time. Why should a case, because it is not reached within two days, be necessarily continued for three or six months? If cases were tried in their order, without regard to terms, would not some of the delay be avoided? Then about your way of commencing civil actions. As I understand it, you go into the court's office with a writen demand for a summons, which has to say whether the summons is to be in 'assumpsit,' that is for breach of contract, or 'in trespass.' Why this distinction? Contracts are enforcible only, because the law has made them so, so why should one class of unlawful acts in this respect be treated differently from another? and is delay not caused where actions have been commenced in assumpsit, which should have been brought in trespass, and vice versa? Besides, it may quite often be a toss up, which is the proper form. The summons in assumpsit sets forth the amount of your claim, but not its basis, except in the most general way, and the summons in trespass does not name any sum or basis at all. You are summoned to appear . . . there to answer . . . of a plea. But this is not seriously meant. If you should be innocent enough to obey the summons, you will find that the plaintiff is not there, that your case is not then before the court at all, but that what you have to do is, to get a lawyer to go into the office, or to go yourself, and file a piece of paper upon which you say that you do appear. And if you try to answer 'of a plea,' you will find that there is no plea to answer or to answer of. No, the plaintiff, under Pennsylvania practice, need not file his statement of claim until a year hence; during all this time you are, or may be kept in ignorance of the exact nature of the claim against you; in cases of contract

you will probably have some general idea of what the suit is brought for, but in damage cases you may not even have a suspicion of what the trouble is. Now, why is this? Does it serve any other purpose than that of delay, or perhaps of harassing the defendant?

"At last the statement of claim is filed, and a copy served on you with a so-called rule to answer within fifteen days; that is, if the action is in assumpsit; if in trespass, you need not answer at all, but only file a formal plea of not guilty, for what reason, I suppose, nobody can say, at least nobody can give any but an historical reason. But as a matter of fact, you need not answer at all; you can take out a rule to show cause, why a more specific statement of claim should not be filed, or you can demur, both of which practically mean that you ask that the case be dismissed for being improperly brought. Well, some day, often a couple of weeks hence, is set for the hearing of argument on this rule, and as it is the trial judges who hear the argument, the trials of cases are stopped and delayed while these arguments go on. Most of these rules are overruled, and were evidently brought for the sake of delay, whatever the affidavits atttached may say to the contrary. But whether overruled or not, one or the other of the parties will have time granted him to amend or answer. Suppose an amended statement is filed, you may then have to go through the same procedure once more, and perhaps with the same result, but even if the answer is filed, the plaintiff may then move for judgment for want of a sufficient affidavit of defense, as I believe the answer is called in Pennsylvania; time has to be given to argue this, sometime hence, and the trial judges are again interrupted in their proper work.

"Having at last gotten the complaint and answer in form, you would think that the case was ready to be tried, but no: you first have to rule the defendant to plead, for which is given him another fifteen days, although a plea is nothing but an attempt to squeeze into one or more technical expressions the defense already set forth at large in the answer. What is supposed to be gained by this formality is beyond me; it has been said to me that by the plea only is the case brought properly to issue but it appears to me that the case is brought to issue by the filing of the answer, but that for some other historical reason it is not *considered* to be at issue, until defendant has filed a piece of paper with the magic words, *'non assumpsit'* on it.

"Well, now at last we are ready to try the case? Indeed not. You must order your case on the trial list; if you do not do it, the case just slumbers (unless defendant should be so anxious that he orders it down), until you one day wake it up to tease witnesses, courts and other people having cases to be tried. And here in Philadelphia, I understand, you must, in addition, put on your trial order, whether it is a case in assumpsit or a case in trespass; if you do not do this, or make a mistake in this respect, your order is often simply ignored. But suppose you give the proper order, even then, I am made to understand, you may count upon two years' delay, before your case can be reached. How is this?"

Judge Black: "Dr. Schwerin, before you answer your own question, allow me a few words. Various of your remarks are very appropriate, for instance, affidavits of defense ought to be filed in all cases, the difference between actions in assumpsit and in trespass might be abolished, as well as the pleas; a plaintiff should not be allowed to hang up his case for a whole year without filing his statement of claim, and remedies for the delays caused by the present rules in these particulars might easily be found. But when we come to the various demurrer, rules to file more specific statement, and for judgment for want of a sufficient affidavit of defense, the situation is different. You must certainly acknowledge, that no defendant should be forced to answer a statement which does not clearly aver a valid cause of action, or that a plaintiff should be forced to the delay, labor and

cost of a trial, where the defendant does not set forth a valid and proper defense. But this being the case, I do not see where our present system can be materially altered or improved upon, but, as my friend Brown said a little while ago, an outsider may sometimes see things that are hidden to the insider, and I should be glad to hear your thoughts upon this subject."

Organization of Courts and Commencement of Actions.—Dr. Schwerin: "I do not see, how I can answer the judge's question without giving in outline, how the courts, in my opinion, should be organized. These remarks will mostly refer to such counties where there are a number of judges.

"In the first instance, then, I would relieve the common pleas judges from all participation in criminal trials; in other words, I would have separate judges for the courts of quarter session and what other names you have for your criminal court. I do not suppose that this proposition needs any argument. Next, I would not have three, four, five or more separate courts of common pleas within the same jurisdiction, but one general court with one president and so many associate judges. This court I should then divide into two departments, one of say two or three judges to hear and decide all questions arising before trial, and the other consisting of all the other judges, each sitting separately and having no other business than to preside at trials.

"Then I should reorganize the commencement of action entirely. As the first step, the plaintiff should file his statement of claim, whereupon he would be granted a summons; with the summons should be served a copy of the statement of claim; the summons should command appearance and answer on a certain day, say ten days after service, and I would in that way abolish fixed return days. On the day fixed, it should be the duty of the defendant to appear in person or by his attorney before the court (its first department) and not in the clerk's office by a bit of paper; he should then and there file his answer with a copy thereof, to be handed to the other side who should, as matter of course, be granted a week's or ten days' continuance. If the statement of claim does not show a valid cause of action, or is so confused that the court cannot from it form a clear idea of the nature of the plaintiff's case, the defendant should have the right to demur, or to move that the case be thrown out of court, without prejudice, however, so that the plaintiff may commence a new case if so disposed, but I should do away with all amendments, thereby compelling plaintiffs to commence their actions properly; on the other hand, I should do away with all artificiality in the preparation of pleadings, all set phrases and words, the only requirement being that the case is so set forth that the court can understand it without having to surmise or infer anything except the legal consequences of the facts as stated.

"In the same way with answers but if they do not show any defense good in law, the plaintiff should have the right to ask for judgment on the pleadings, and the motion to that effect he should make on the day to which the case was continued at the time of the filing of the answer. Motions for a more specific statement of claim, as a separate species of pleading, I should do away with. All arguments on these preliminary and formal questions should be in the form of briefs, so as not to take up the court's time unnecessarily.

"The clerk's office should be reduced to what the name would imply, namely a department for the keeping of the books and the custody of the records, and no decrees judgments or orders should be entered as of course.

"Judgments for want of an appearance would be abolished, as there would always be a statement of claim on file, and judgments for want of an affidavit of defense would not be granted as of course, as the court would first examine the statement in order to see that it in itself was a proper foundation for a judgment of the court; if this should not be the case, the court would

enter a non-suit without prejudice; in other words, no judgment against the plaintiff, granted on the pleadings, would be considered *res judicata* as to the merits of the case."

Judge Black: "I am not prepared to criticise the doctor's suggestions in detail, but can see that they have some merit; I only wish to say that, in practice, the delay in trying cases caused by preliminary motions and arguments is comparatively small; in the great majority of cases, the statement is filed promptly, and the plea and affidavit of defense within the times specified, and I am not at all sure that the adoption of Dr. Schwerin's plan would perceptibly shorten the time within which a case could be brought to trial here in Philadelphia."

"I beg to differ with you there, Judge," said Mr. Brown. "Like you, I am not prepared to discuss the doctor's plan in detail, but I can readily see that if the trial judges could be saved from hearing and passing upon all motions, etc., made prior to trial, a great saving of time would be made, which could be applied to the actual trials, thereby enabling each judge to dispose of so many more cases each week; for while it is true that most cases pass to trial without any delaying motions and rules, still we all know how many of these there are, and how much time and effort it takes to dispose of them. But what struck me most favorably in the doctor's outline was his proposal to make all pleadings purely informal, requiring no more from them than from other writings, namely, that they must be full and easily comprehended by those for whom they are intended. There is a fiction in Pennsylvania, that we have abolished formal declarations, and that our pleadings are in fact informal, and to some extent this is true, but still we are taught that it at times is necessary to aver in the pleadings that the party expects at the trial to be able to prove his statements, and similar other mere formal averments, and if a purely informal statement or answer should be filed, they will be looked upon as freaks, disclosing the ignorance of the attorney who prepared them. If we could really force or induce the profession to make their pleadings merely narative and informal, there would be very little seen of demurrers, etc., because they would have lost their usefulness; technicality of pleadings naturally leads to all sorts of technical objections, etc."

Growth by Accumulation of Common Law Procedure.—Dr. Schwerin: "I agree with the judge that the direct saving to be made by the plan sketched by me will not amount to very much so far as those cases are concerned, in which the preliminary motions are made, but—as Mr. Brown suggested—the total saving of time for all the cases will be considerable, both in making such motions very much scarcer, and in having them disposed of without interfering with the trial courts. I look upon your system, or that part thereof which so far we have considered, in this way. You had, say two hundred years ago, a system much superior to most, if not all systems in use in other lands, and as from time to time it became out of plumb, so to speak, with modern conditions, you hated to do away with it, and knowing how well it had worked and served, you had difficulty in discriminating between those parts thereof which were essential, and those which were mere transient forms; if you should do away with any part of the structure, you were afraid that the whole house might come down upon your heads. For this reason, you have never reformed your system of procedure, but you have kept on amending it, as necessity required, until it cannot be worked except with a tremendous outlay of time and energy. I believe, that if you are going to reform your system of procedure, you must do it so radically that there is no room left for all the old technicalities; otherwise it will happen as in some of the Western States I have visited, where the codes apparently introduce a very simplified system of procedure, but where, nevertheless, the practice is as technical as pos-

sible, these codes having been introduced into actual life by old common-law and equity pleaders from the old states, who have simply grafted their inherited ideas upon the codes, these themselves not directly prohibiting or preventing this grafting process. The actual and worst delays in disposing of cases do not lie, however, with the preliminary motions, etc., but with the mode of conducting the trials themselves. I come here to a very difficult point: Naturally, I have not drafted a code of civil procedure for you! I have read certain textbooks and any number of decisions, and in my travels I have made certain observations; upon these different sources of information I have formed certain opinions and conclusions, but not in any systematic way. In addition, I have found that the system of procedure in force in America, or certain essential parts thereof, is an especial object of pride to the American jurist, and I have come rather near offending some of my friends among them by criticising portions thereof which to them have become invested almost with the crown of beatification, if not of canonization. Before I proceed further, I wish to say, then, that I intend to attack the two holiests of holies, namely: your rules of evidence and their application, and the authority you give to the decisions of the courts, or precedents, besides various and sundry other matters in connection therewith. But at the two points specifically mentioned is where your principal troubles may be found: *hic Rhodus, hic salta*, or, as we say in German: *Da liegt der Hund begraben.*"

Divergent Views on the Subject of Evidence by Common Law and Continental Practitioners.—"I realize that I have undertaken a rather large contract, and that I very likely shall exhaust your patience before I get through; and I realize as well my lack of qualification to discuss these subjects with you; with you they have become, so to speak, part of your blood and of your whole being, while with me they necessarily are something external, something whereof I have a theoretical knowledge, but a thing which, while I have seen it work, I have not worked myself. For these reasons, I shall be compelled to confine myself mostly to general statements and arguments. Before I go further, it may be well to relate an experience which I had shortly after arriving in America. The incident happened in Chicago. I attended a meeting of a sort of lawyers' argument-club, at which one of the judges of one of their courts was scheduled to relate his impressions of the courts, etc., in France, where he had spent his vacation. His lecture was very interesting. He was evidently a man of keen perception, and he gave full credit to the dignity with which the proceedings had been conducted, to the juridical keenness of both judges and lawyers, but with a twinkling in his eyes and a very sarcastic tone in his voice let his audience understand, that these benighted foreigners had not advanced far enough to have a decent set of rules for the introduction of evidence; everything was allowed to go even hearsay evidence; at this the audience roared.

"I have mentioned this incident in order to show, how very different the matter of evidence is looked upon by English-American and Continental lawyers, so that the first impression on either on coming in contact with the other system is one of ridiculousness. At the same time, neither system is something that has been just invented; both are founded upon historical facts and a vast amount of reasoning and experience.

Origin and Growth of the Law of Evidence.—"We all know that among all the Germanic people who worked the destruction of the West Roman empire, originally evidence in anything like the form wherein we use it, was practically unknown; the only evidence accepted was the oath of the accuser (plaintiff) or the accused (defendant) accompanied by that of a certain number of relatives, neighbors or peers, eleven, twenty-three or thirty-five. If such twelve-man's-oath (or its multiplum) was furnished by the party whose duty it was to pro-

duce it, the case was settled; such oath was full proof, and no counter evidence was allowed. Here we see the theory of law-bound evidence in its purest and strictest form.

"As society developed this could not remain so, and gradually other forms of making proof were introduced. Not to mention gauge of battle and ordeal, it became the custom to inquire of the men attending court (which were most of the free men of the community) what they knew of the case; this again developed in various ways in the different countries, in England into the jury system, in other countries into committees appointed by the court to make investigation and report. But in whatever form the deevlopment took place it became necessary that evidence in the modern sense should be allowed, and that both sides should be permitted, to introduce such.

"Naturally the transition from one single form of proof to the free theory of evidence was not made in one step; what evidence should be considered proof, and in what manner it should be introduced, called forth the most minute arguments and differentiations, and until the latter part of the eighteenth century, the introduction and relative weight of evidence was everywhere as law-bound as it is in England and America to-day. But to-day it is a fact that in almost every country on the continent there are no rules of evidence (excepting such, of course, that you are not allowed to ask leading questions except in cross-examination), but the so-called free theory of proof is almost everywhere in force, at least as the general underlying principle.

The So-Called Free Theory of Proof.—"By the 'free theory of proof,' we mean that the law neither says that such and such evidence shall be considered proof, nor that such and such evidence shall not be considered in determining the case, but that all facts and circumstances which the parties consider of value to their case may be shown to the court, which then founds its judgment upon the facts shown, according to accepted rules of logic and psychology. When, therefore, continental countries allow all sorts of evidence to be introduced, even hearsay evidence, it is not because they have not advanced far enough to introduce rules of evidence like those in force here, but because they have advanced beyond this point and have discarded those which they once had, as a useless hindrance and incumbrance."

Judge Black: "I believe, Doctor, that you have lost sight of one thing, namely: that while in continental countries they do not have juries in civil cases, we have such in all cases at common law. As I understand it, judges of European countries, in order to obtain their seats on the Bench, must be trained, not only in law, but must have a general university education, including one in general philosophy and all its branches. It may be proper and plausible —I neither deny nor affirm it—in courts so constituted, to allow the free theory of proof, and possibly thereby save time without endangering the chance of doing substantial justice in the case on trial; but under English law, where juries decide the facts, this theory would never work and would lead to confusion worse confounded, and to innumerable cases of miscarriage of justice."

Is the Free Theory of Proof Doctrine Applicable to Jury Trials.—Dr. Schwerin: "I have not overlooked the difference you mention, Judge, and I have often heard this difference given as an explanation of your rules of evidence, but if this difference in the constitution of the trial court ought to have any influence upon rules of evidence, it appears to me that if the free theory of proof ought to rule where the judges are the whole court, so much the more ought it to be the case where juries pass upon the facts. But before going into this, I wish to say that I do not believe juries have had anything to do with the framing of rules of evidence, or at least with keeping them alive; in equity cases you do not employ juries, but you stick

strictly to the same rules of evidence, nevertheless.

"But, as I said before, if the free theory of proof has any merit at all, it ought to have special merit in all jury trials. Why are juries employed? Because there is a fear (I do not here take the historical reasons into consideration), that the learned judge shall be inclined to take a too technical view of the case, with the result that *summum jus* may become *summa injuria*. For this reason, twelve men familiar with the ordinary conditions of life and with the motives and morals of ordinary men are called in, and to them are submitted the facts of the case in order to reach a common-sense determination thereof. These jurors are supposed to come from the common people and to form judgments and reach conclusions as the ordinary man does.

"But how does the ordinary man reach his conclusions? By what he hears and sees. But he hears much more than he sees; the more complicated life becomes, the less a man can depend solely upon his own personal knowledge; he would be left woefully behind in the procession, if he attempted to do so exclusively. In all the most momentous crises of life, he is almost entirely reduced to depend upon common repute, and he learns to know that direct evidence is not always the best. If the village gossip tells me that he saw Jones do so and so, I shall accept such testimony *cum grano salis*, but if Judge Black tells me that he had heard Mr. White say that he had seen Jones do the same thing, I shall at once believe that Jones really did such a thing, and shall act accordingly.

"Speaking in the abstract, direct evidence is, of course, better fitted to furnish proof than hearsay evidence, but *in concreto* the latter will often be found more trustworthy than the former; for what does proof mean? It means, that such circumstances have been shown, that the ordinary man, or the judge, as the case may be, has been convinced in his mind, that the averments of a certain statement are true or untrue. You cannot beforehand say that any kind of form of circumstance is unfit to produce such conviction, for while there are certain general rules for the working of the human mind, psychology is not an exact science in the same manner as geometry; the convincing force of almost any fact or statement depends to a very large extent upon the accompanying circumstances.

"You know how long it took and how much effort it took to have proof by circumstantial evidence allowed. This is the same thing over again. Where the free theory of proof has been accepted, it has been done upon the conviction that every-day life furnishes constant proof of the truth that no absolute rules can be given for, when a statement or circumstance may be of a character to furnish proof, and when not. It has been thought safer, and more tending to produce justice in the end, to allow the parties to furnish anything in evidence that they may think of value to their case, and then appoint to the bench such men only who, through their scientific training and experience of men and things, have acquired the habit of discrimination.

Common Law Procedure a Relic of the Old Scholasticism.—"When I read through one of your authorities on evidence, I have the same feeling as if I were reading one of the old schoolmen, St. Thomas Aquinas, Albertus Magnus or Petrus Lombardus. They all begin with their "posito," and then go on to draw from these premises the sharpest logical conclusions, until they very often arrive *inabsurdum*. Erasmus and Bacon gave scholasticism its death-blow, but it continued to linger in certain spheres for quite some time, but since Wolff it has been abandoned in all regions of thought except in that of English-American law. In all discussions of questions of law, you never start at the beginning, but at some "posito," sometimes one of the admirable short sentences or definitions of a Roman jurist, more often a dictum of some English Law Lord who had occasion to express

himself sententiously two or three centuries ago. It never strikes you to go back of him, and try to find out whether this dictum of his ever was founded on sound principles, or whether under changed circumstances another principle should not be applied; no, this point has been settled, there is no getting away from it, and in order to make it fit but tolerably into present conditions, so many exceptions, differentiations, etc., have to be made, that the law gets into a most cumbersome and uncertain state, becomes a labyrinth to the exit of which nobody really has the key.

Why Exclude Any Kind of Evidence?—"And what is gained by excluding evidence? Nothing, so far as I can see. The non-admissible evidence is bound to come before the jury, anyhow, and in the worst possible form, to-wit: as suspicions and intimations. Most lawyers will ask their witnesses questions which they know are not admissible under the rules in force. Why? In order to raise a suspicion in the jury's mind, and intimate to them, that if the whole truth could be told, their party would come out with flying colors. And, mind you, there can be no cross-examination upon a question so put but thrown out. True, you will say, but the judge will in his charge to the jury call their attention to their duty, not to regard anything but the admitted evidence. But, whoever knows anything of the human mind and its workings, knows also that an impression once made will have its consequences, even if unconsciously. The lawyer who asks these forbidden questions, knows this, and although he also knows that his questions will not be allowed to be answered, he still asks them with the sure expectation of "prejudicing" the jury's mind, as it is called. Now, is it not better to go openly about it, and to have a legal investigation carried on like all other affairs of life, giving the greatest latitude to the parties to elucidate the questions in dispute by whatever means?

I have been quite interested in noting, that you evidently have a more or less conscious feeling that investigations conducted in the forms of legal proceedings, are not the best means to bring out the truth. Whenever you wish to know the real truth, you appoint an investigating committee, to which you give the right to subpoena witnesses, call for documents, etc., like a court, but which you also exempt from following the ordinary rules of evidence."

Does the Free Theory of Proof, in Practice, Delay the Trial?—Mr. White: "Doctor, I understand you to argue for a form of procedure which will do away with some of the law's delays. I shall not, at present, go into the respective merits, generally speaking, of the free and the law-bound theories of evidence, but part of your own argument seems to defeat the very purpose for which you labor. It is true, that when we want the full truth we appoint an investigating committee, and give them liberty to hear and receive all sorts of evidence, but we do this only, when time is not of the essence of the matter, for we know that among the evidence submitted to such a committee a very large part will ultimately be found to be utterly irrelevant and of no value whatever, while the taking and submission thereof has taken much more time than could possibly have been consumed by the arguments as to its admissibility, if the ordinary rules of evidence had been followed. Therefore, I say, whatever the merits of the free theory of proof otherwise may be, it has not the merit of saving time. *Quod erat demonstrandum.* Now, a proper judicial system must take into consideration many things, of which the greatest amount of ultimate relative justice, of course, is the most important. But the ending of litigation is nearly as important. If, therefore, the system you advocate leads to the prolongation of litigation, it is bad in itself, and is certainly not fit as a cure for the law's delays."

Dr. Schwerin: "I had expected this ob-

jection, and am glad Mr. White brought it out at this time and stated it so pungently. It is natural that you should feel that the free theory of proof necessarily brings with it a deluge of irrelevant evidence, but I dare say, that when your experience has been in this direction, it is because your Bar, as such, so far has had so little experience in practicing it. Under your present system, it is of interest to the practitioner to get even irrelevant evidence in, because when once admitted, it becomes part of the evidence of the case, upon the basis of which it will be determined; therefore, when the practitioner once in a while comes before a semi-judicial body where anything in the line of evidence goes, he cannot disengage himself from his customary view, that if the evidence can only be gotten in, it will have its effect, and so he indulges himself to his heart's content. But if the free theory was once adopted, the Bar would soon learn that it would be waste of time to put in any irrelevant testimony; it would be sure to have no direct effect, and if any indirect, then a purely detrimental one, as giving the impression that the party did not have relevant evidence enough, and therefore tried to supplement it by any means at hand.

"I believe that here an advocate is considered extra smart and ingenious, when he can so present irrelevant and other forbidden testimony that the court allows it to go in. Where I used to practice law, it was the cause of the greatest humiliation to a lawyer, if he were caught introducing irrelevant evidence, showing that he did not know better. I once, when I was young and conceited, unfortunately and unintentionally, created an enemy for life, by stating to the court that my friend on the other side had, 'as he has a habit of doing,' introduced a quantity of irrelevant evidence, thereby holding him up to the court as an ignoramus; he never forgave me. I feel sure that if the free theory of proof were adopted here, the result would be the same; it is the logical consequence, and must, of necessity, follow.

But suppose, for the sake of argument, that a great deal of irrelevant evidence would be introduced under this system, even then there would, without doubt, be a great saving of time by its introduction. You would get rid of the innumerable motions for new trials with resultant appeals, caused by questions of the admissibility of evidence.

"I have been informed, that of all appeals taken in Pennsylvania from the decisions of the lower courts, more than one-third are upon technical grounds, and of them again by far the greater number upon questions relating to the admission of evidence. If the free theory of proof were adopted, all of these and most of the motions for new trials would be eliminated, and what a saving of time would this not be, not only to the courts of appeal, but also to the courts of first instance, which must hear the motions and conduct the new trials."

Mr. White: "Doctor, I am sorry to have to interrupt you, as you seem to have warmed up to your subject most splendidly, but time is of the essence to this committee, and we shall have to adjourn for the day. Whether we agree with you or not, Doctor, and most of us have probably not at this time fully made up our minds as to that, we highly appreciate the deep interest you evidently have taken in the subject you were sent over here to investigate, and even more do we appreciate your unselfishness in giving to us so much of your limited and valuable time, and to acquaint us with the conclusions you have reached. I hope to see you all here next week. The meeting stands adjourned.

ADVOCATUS DIABOLI,
(Mr. Axel Teisen).

Philadelphia, Pa.

To be Concluded in Next Week's Issue.

BANKS AND BANKING—CHECK AS ASSIGNMENT.

ROGERS COMMISSION CO. v. FARMERS' BANK.

Supreme Court of Arkansas, Oct. 30, 1911.

140 S. W. 992.

Since the giving of a check on a bank is not an assignment of the amount of it to the payee, on which he may sue the bank prior to acceptance, there is no liability on the part of a bank to pay a check drawn against it until acceptance, regardless of the state of the depositor's account.

Appeal from Circuit Court, Searcy County; Geo. W. Reed, Judge.

Action by Rogers Commission Company against the Farmers' Bank. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Plaintiff sued the defendant, alleging: That on June 1, 1910, a check was drawn by Crisp & Burman upon the defendant for the sum of $117.07, which was, on June 6, 1910, in due course of business, presented to the bank for payment, at which time there was deposited in the bank in favor of the drawer of the check the sum of $300, sufficient to pay the check and discharge its obligation. That the defendant wrongfully refused to pay it, and wrongfully procured the check to be protested, causing plaintiff to expend the sum of $4.15 protest fees. That said sum of $300 deposited in defendant's bank was the property of Crisp & Burman, and subject at the time to said check of the firm. Prayed judgment for the amount of the check, and judgment and protest fees. The answer denied liability and all the allegations of the complaint.

The testimony tended to show that the check was presented to the drawee bank on the 6th day of June; that it was stamped "paid;" that the "paid" stamp was thereafter marked "error," and on that day the check was duly protested for nonpayment, and notices sent to all the parties. It further developed that the books of the bank showed on that date a credit of more than $300 to the drawer's account, subject to his check, and that the check sued upon was actually charged to the account of the drawer, and that other checks were thereafter presented and paid the same day to such an extent that the drawer's account was overdrawn more than $100 at the close of business. The cashier explained that the check was erroneously marked "paid," and was not in fact charged against the drawer's account; that there were no sums in the bank to the drawer's account, since the bank held a check in the cash drawer for $300 in its favor at the time the plaintiff's check was presented, which was so held and not paid because of there being no sufficient funds. It seems the bank's $300 check was the individual check of Will Crisp, who, the cashier stated, was successor to the drawer firm, which he swore had been dissolved before the check was given. He stated further that the drawers had been allowed frequently to overdraw, and that the bank's book, as exhibited in the court, did not correctly reflect the account of the drawers of the check. The drawers of the check failed, probably the next day after this transaction of presenting the check at the bank. The testimony of the cashier was by no means satisfactory, and his disposition appeared to be to conceal, rather than to reveal, the true condition relative to the drawer's account, and presentation and refusal of payment of the check, if not a juggling of the facts and entries for the protection of the bank, after the failing condition of the drawer was discovered.

When the testimony was all in, plaintiff moved to amend its complaint, by alleging the acceptance of the said check upon its presentation, by which the bank became bound to its payment to plaintiff, which motion was denied and to the denial of which exceptions were properly saved.

The court instructed the jury, over plaintiff's objection, in effect, that, if they should find from a preponderance of the evidence at the time the check was presented for payment that the drawer had an amount of money on deposit equal to or more than the amount of the check, they should find for the plaintiff, otherwise for the defendant; and that if they should find from the evidence that the check was received and marked "paid," and charged to the account of the drawer on the books of the bank, that it would be a strong circumstance against the defendant, although it would not be conclusive, and might be overturned by a preponderance of the testimony that there was no money in the bank at that time. From a judgment for defendant, plaintiff appealed.

Pace & Pace, for appellant.

KIRBY, J.: (after stating the facts as above). (1) This case was tried upon a wrong theory of the law. The complaint did not state a cause of action; there being no liability upon the part of the bank to the payment of the check of one of its depositors until the acceptance of the same by the bank, regardless of the state of the depositor's account.

This court has already held, with the decided weight of authority, that the giving of a check upon a bank is not an assignment of the amount of it to the payee, upon which he could bring a suit against the bank for its payment; there being no privity between the drawee bank and the holder of the check until acceptance by it. Sims v. American Natl. Bank, 135 S. W. 356.

(2) The amendment asked to be made was material, was in the discretion of the trial court to permit, and was shown by the testimony to rest upon such facts as were within the exclusive knowledge of the defendant, not known to, and that could not have been sooner ascertained by, the plaintiff. The facts furnishing the basis for the proposed amendment were disclosed by the defendant's testimony, and were submitted to the jury without its objection. Defendant could have been in no way surprised, nor its defense of nonliability changed, by the amendment, which was offered to be made as soon as the facts were discovered; and the court should have granted the motion and permitted the amendment. Southern Ins. Co. v. Hastings, 64 Ark. 257, 41 S. W. 1093. The question for the decision of the jury was whether the bank had become liable to the payment of the check by reason of it having been marked "paid," and charged to the drawer's account under all the circumstances and testimony relating thereto; and this question was not and could not have been submitted to the jury under the original complaint and the erroneous instructions given by the court.

(3) It was not necessary to the bank's liability that it should have on deposit to the drawer's credit more than the amount of this check at the time of its presentation, for it would have become liable to its payment by an acceptance of it, and could have permitted an overdraft, as it had usually done, or withheld its own check, which it claimed to have in its drawer, against the account of the maker of the check, which latter the testimony indicates it did do.

For the error in refusing the amendment and giving said improper instructions, the judgment is reversed, and the cause is remanded, with directions to permit the amendment, and for a new trial.

NOTE.—*Right or Not of Payee of Check to Sue Bank for Refusal to Pay.*—The question decided by the principal case is one as to which decision has long been in conflict, and it may be said to be greatly useless to attempt to collate authority *pro* and *con*. The United States Supreme Court has exercised an independent stand upon it as being within the domain of general law. We refer to the trend of authority rather than resort to specific reference to cases.

The principal case adhering to its ruling in Sims v. American Natl. Bank, *supra*, we find on referring to that case that it asserts, as to assignment by the giving of a check, that "the great weight of authority is against the proposition, Zane on Banks and Banking, §§ 146, 147; Morse on Banks and Banking § 403." It further says: "The precise question was answered in the negative by the United States Supreme Court in First National Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 230." Further it says: "In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of different states with each other. So closely interwoven is such business activity and association with the vast commercial life of the nation and since the United States Supreme Court is the highest court of last resort, and does not follow the decisions of the state courts, upon the general banking and commercial questions, we will follow it."

If, however, the highest court of last resort has no right to prescribe a rule of its own on these questions, this would seem a lame reason for following it, and this desirable uniformity would have better prospect of attainment if it sought a leader having the right to lead. We have little doubt but what state courts would follow the United States Supreme Court on these questions as cheerfully as in its interpretation of federal law, if it could once believe it had a like right to lead. Otherwise we think it more beseems state courts not to encourage that court's interference.

As to references to Zane and Morse, we find the following in the former: "This rule (that checkholder can sue the bank) introduces such difficulties into the law that the grounds of it are worthy of serious attention, not less so on account of the fact that both Mr. Morse and Mr. Daniel have given the rule their enthusiastic commendation." One of the reasons for this trouble is that the federal courts will not follow the local law. Mr. Zane, therefore, seems to think the state courts should give way. Zane also goes into a labored argument, somewhat intemperate too, as seems to be indicated by the following excerpt: "The leading case is Munn v. Burch (25 Ill. 35). The opinion is by Chief Justice Caton. He was, no doubt, a man of strong original power; but he cannot be said to have had any accurate scientific knowledge of the principles of law"; the opinion was written as at comparatively early day. It really was a presumption for a court in a state that had so little banking to assume to talk with such aplomb of commercial usage." Further on at the end of a labored attack on Illinois for persisting in this doctrine he says, with remarkable dignity: "But the courts of the state seem so firmly wedded to this proposition, untenable as it is, and confusing as it renders the law of banking, that there is little hope of a change. 'Ephraim is joined to idols; let him alone'; but a later saying of the prophet asserts, as a celebrated writer wittily observes, that Ephraim shall remain 'a wild ass alone by himself.'" This intemperate stuff should

greatly commend its author. As he is or was of the Chicago bar, it must be thought he had a sore spot or so.

Morse says: "The most numerous body of decisions sustains the view that a check is neither a legal or an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank." He then refers to the United States Supreme Court and Alabama, Colorado, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee. On the other side of the proposition are mentioned Illinois, Iowa, Kentucky, Nebraska, South Carolina, Wisconsin, and cases from some of the states first mentioned of older date. He says: "Illinois and South Carolina are the strongholds of the doctrine."

In Guthrie National Bank v. Gill, 6 Okla. 560, 54 Pac. 434, it was held that if a bank has funds in its hands when a draft is presented it should pay the draft and if it did not it could be sued upon the draft, it seemingly adopting the view that a bank impliedly promises to pay a depositor's checks by whomsoever presented, and this promise gives to a holder of a check a right of action "though there be no acceptance."

A recent decision by one of California Courts of Appeals, says: "A checkholder is a mere bearer of an order drawn by the depositor. The making and delivery of a check does not work an assignment of the deposit fund or any part of it, and is not binding on the bank against which it is drawn until accepted by it. The modern authorities are generally to the effect that, even though a bank refuses payment, where the deposit is sufficient to cover the amount of the face of the check, it becomes charged with no liability to the bearer of the check. The bank is in such a case responsible to the depositor only and may be sued by him for damages." Marble & Co. v. Merchants' Natl. Bank, 115 Pac. 59. Why, however, should it not be, if it is an interloper between two parties and causes either injury? Want of privity with the holder is the argument, but where this privity may be supplied reasonably, if not technically, that is to say through a promise made for the benefit of a third person, why should it not be good enough against injury from any person having no legal interest to the contrary? If the third person were specifically mentioned, there would arise the privity. Is not the bank's promise an open commission to name the third person when the depositor chooses so to do?

In McFadden v. Follrath, 130 N. W. 542, the Minnesota court, included by Morse and Zane as among the states holding a check is not assignment, it is said: "In this state the right of a payee to maintain suit against the bank on its wrongful refusal to pay a check, when presented, does not seem to have been determined. * * * But it is the settled rule in this state that, under the circumstances of this case, an unauthorized payment and subsequent charge to the account of the drawer is a sufficient basis for a liability of the bank to the payee." The circumstances spoken of were that an agent of the payee received a check for it, the payee being a corporation. The agent indorsed on the check payee's corporate name by "(H. J. G.) agent," and the bank paid it and charged it to drawer's account. The agent did not account to payee. "The bank was bound to determine at its peril that he had authority as agent to make such indorsement and receive payment of the check." This indorsement may scarcely be called a forgery, but the check may be said to have been acknowledged as sufficient to withdraw the funds when indorsed properly. Therefore there was acceptance.

So far as this question being one of general commercial law is concerned, we have our doubts. If bank checks were used altogether locally, it would not seem to be such, and considering that bank checks in commercial centers are so easily obtainable and are more satisfactory than personal checks, other than local use ought to be regarded as exceptions in commercial usage.

C.

CORAM NON JUDICE.

SUBSTITUTES FOR INCORPORATION.

An esteemed correspondent, Hon. Charles F. Libbey, of Portland, Me., ex-President of the American Bar Association, sends us an extract from "The Chronicle" (a banking journal), of August 16th, 1902, which refers to a substitute for incorporation devised by Alexander Hamilton, which we here reproduce.

"Although Boston has been the scene of the greater development of these trusts, we are indebted to New York and to the greatest of American statesmen, Alexander Hamilton, for an early—perhaps the earliest—example of this conception and an important application of it. I refer to the articles of association or 'Plan of the Merchants' Bank' which may be found in his collected works (Congressional Edition Seven. 838), and form a striking monument to the diversity of his genius. At that time private banking was allowable. The New York Legislature was jealous of corporate banking and refused to grant charters. Joint-stock private banking was open to all, but involved unlimited liability in every stockholder, a difficulty recently touched on in your review of the history of the Bank of New York.

"Under these circumstances, Hamilton evolved the first of the two great ideas of the modern trust, limited liability, and the equivalent of corporate form and power without assistance from any legislature. The eleventh of these 'articles of association' for a joint-stock private bank read: 'It is hereby expressly and implicitly declared to be the object of the persons who associate under the style or form of the Merchants' Bank that the joint-stock or property of the said company (exclusive of dividends to be made in the manner hereinafter mentioned) shall alone be responsible for the debts and engagements of the said company.' And this is followed by other and stringent provisions, which by admirable draughtsmanship must fully protect the shareholders. Suits are to be brought against the president only as the representative of the company—a device still to be found in New York law. 'All persons dealing with the company agree to these terms and are to be bound thereby.' All contracts

declare this immunity, and the officers have no power to make any contracts or bind the enterprise in any way unless this is incorporated in them. It is to be in every passbook. The shares are made transferable. Directors and officers and their election are provided for, and the complete working scheme of a corporate enterprise is there, ready for use, with no sponsor but the draughtsman."

HOW LAWYERS OF A CENTURY AGO ADVERTISED.

In looking through a number of old papers, which had belonged to his grandfather, Mr. N. T. Gentry, of Columbia Missouri ,found a clipping from the Franklin Intelegencer (the second newspaper printed in this state), which shows how the lawyers of that day advertised. The newspaper is dated June 1st, 1821; and the advertisement reads as follows:

Cornelius Burnett

Respectfully tenders his services to his friends and the publick, as a practitioner of law, and flatters himself with a hope that, from his determined attention to business, he will meet with a small share of publick patronage. He will attend the Circuit courts in the Counties of Cooper, Saline, Lillard, Chariton, Ray, Boon and Howard. His office is kept in the large house on the east side of the Public Square, formerly occupied by Mrs. Pebles, where he will at all times be found unless absent on professional business.

(The spelling and capitals are as they appear in the newspaper.)

N. T. G.

CORRESPONDENCE.

MOVING PICTURES AS INFRINGING COPYRIGHT.

Editor of Central Law Journal:

73 Cent. L. J. 442, is not quite fair to the Supreme Court of the United States in commenting on Kalem Company v Harper Bros. You say you "think the court is substituting itself for Congress," and that the learned justice who wrote the opinion "goes upon the theory that illusion is so near to reality, that is to say, a moving picture to life, that it should be called a drama." In this you are not quite correct.

If there had been a dramatization, as the word is ordinarily used, of the author's work, and it were put on the stage, with both voice and action, this would be admitted an infringement which could be enjoined. Now, if a moving picture person attended a performance of that dramatization with his machine, and made a set of films of the stage, scenery and action, the subsequent exhibition of his pictures would be a mere reproduction, in all except voice, of the improper dramatization. If this could be tolerated, why should he not with equal impunity, have trained elocutionists, stationed in the wings, to add their voices to the illusion? And what would be left of the dramatization unreproduced?

To reproduce a part of the unlawful dramatization must be an infringement as well as the reproduction of the whole. This is what the supreme court holds. The opinion says: "If the exhibition was or was founded on a dramatizing of Ben Hur, this copyright was infringed," and further—"We are of opinion that Ben Hur was dramatized by what was done." The court holds, also, that, a pantomime is a drama, and a mechanical pictorial reproduction of a pantomime is none the less a drama. There was certainly a pantomime dramatization which the pictures reproduced. There is no legislation in this decision.

Yours truly, though hastily,

FRANK W. CLANCY.

Albuquerque, N. M.

[Note.—Our correspondent does not dispute the applicability of the rule of construction to copyright we stated, and our suggestion was, whether under that rule—one of strictness in respect of a privilege in derogation of common right—the court was correct in its decision. To a better understanding of the question we set forth more fully than does the opinion by Mr. Justice Holmes our copyright law. It gives to authors, etc., of a book, map, chart, musical composition, engraving, photograph or negative thereof, models, etc., etc., the sole liberty of printing, reprinting, copying, etc., same. Then the statute says "and in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have the exclusive right to dramatize and translate any of their works." This statute is substantially as it existed in 1870. U. S. Comp. Stats. 1901, Sec. 4952, and note. In Daly v. Palmer, 6 Blatchf. 256, which is cited by the opinion, the case was whether there was infringement of copyright in a dramatic composition, where the idea, substantially plagiarized, was redramatized and produced on the stage just as was the original. It is to be noticed the copyright law, as to authorship embraces a multitude of things and the only thought is of copying the same thing and vending it. As to dramatic composition, the exclusive right being in the author of the work dramatized, that it is not "to be performed or represented by others." In the case considered there was no performance or representation of a dramatic composition, and the statute does not specifically forbid representation of an undramatized work. Remembering now that in the section on copyright one thing is prescribed as to a book and another thing as to a dramatic composition of a book, why should construction give a right as to a book, that may never be dramatized, which is prescribed only in behalf of dramatic composition? This, of course, means representation, that is not drama. We concede that what is drama is forbidden. At all events, and independently of our difference with our correspondent, long a personal acquaintance of this writer, we extend our congratulations to him as the first Attorney General of the State of New Mexico.—Editor.]

BOOK REVIEWS.

AMERICAN STATE REPORTS. VOLS. 139 AND 140.

The former of these two volumes is the first since the death of their famous editor, A. C. Freeman, and its title page tells us that it is of cases "Selected, Reported and Annotated by

the Associate Editors of the late A. C. Freeman," and so says the title page of the other.

The plan of Mr. Freeman pursued for so many years is preserved, and it might be wished that the annotations, which widened the fame of Mr. Freeman's authorship in the law, showed the individual views of his late associates. Frat qui meruit pilmann.

However, the profession is interested in whether such work is to be kept up to the standard set by Mr. Freeman, and which no doubt it is the ambition of those who were his associates to do.

These two volumes contain many exhaustive monographic notes on important subjects, besides the usual note it is the custom to give ot the end of each case. For examples notes on Devise or Bequest of Mineral in Mining Claims and Rights of Location Prior Thereto; Validity of Contracts Between a Director and his Corporation, and Liability of Charitable Institutions for the Torts of their Servants and Agents, these and others being in Vol. 139. Among other elaborate notes in Vol. 140 are De Facto Officers; Specific Performonce of Contracts Calling for Services of a Personal Nature; Damages for Injuries to Growing Crops and Specific, Demonstrative and General Bequests Defined and Distinguished.

This noted series is published as all know by the well-known house of Bancroft-Whitney Company, San Francisco, Cal.

HUMOR OF THE LAW.

As the result of hostile demonstrations, one of the leading citizens of the burg had been taken before the village justice on a charge of assault and battery. He was fat, evidently good-natured in ordinary circumstances, and the proprietor of a conspicuously shining pate. The prosecuting attorney was acting in a perfunctory way, secretly hoping for an acquittal, because he did not wish to arouse the political antagonism of the leading citizen. However, one of the witnesses was the village physician, whom the prosecutor loved not and sought to humiliate.

"You are prejudiced in favor of the defendant, are you not, doctor?"

"No, sir."

"You are his family physician, are you not? And you are afraid you will lose his patronage: consequently you have willfully distorted and doctored your evidence here to curry favor."

"No, I have not; but, since you mention my professional relations with him, I think the jury should be informed that he is suffering from phalacrosis."

"From what?"

"Phalacrosis," repeated the doctor.

Whereupon everybody sat up and took notice; the attorneys put on a dignified studious air; the honorable court pricked up his ears; one and all centered their gaze upon the defendant, who acquired that reddish tint which proclaimed that at last he had been discovered.

"What is this phalacrosis?" asked the prosecutor.

"It is a sort of chronic disease of an inflammatory nature which affects certain cranial tissues."

"Does it affect the mind, cause insanity, or anything like that?"

"Well, I shouldn't wish to answer that question as an expert because I am not posing as an expert; but I have known some persons who were suffering from the disease to become raving maniacs, others merely foolish, some showed destructive and pugilistic tendencies, while many others have suffered for years and never shown any mental abnormalities."

"Well, doctor, just tell the jury all about this sickness."

"I decline to do so. I am not an expert in such diseases, and was not summoned here as an expert witness. You will have to call in an expert to answer your question."

And there the matter rested. The prosecutor told the justice and jury the case was not of sufficient importance to warrant the calling of expensive experts and that they would have to ignore the doctor's testimony as unsupported and unworthy of credence. But the jury promptly acquitted the leading citizen, "because," as the foreman explained, "Doc said there was something the matter with his head; 'phalacrosis' he called it."

When the prosecutor got back to his office he sought enlightenment, and in his dictionary found the following:

"Phalacrosis—bald-headedness."

The doctor also explained, out of court, and the relations between the medical and legal profession in that village are still strained.—The Sunday Magazine.

One of the best known lawyers in Cleveland attended a banquet of his fraternity not long ago and responded to the toast, "Our Wives." On this classic and congenial theme he expanded and fairly glowed. But even after his eloquence fades from the memories of those present one personal note will remain. He said, in part:

"God bless our wives! They know us from Alpha to Omega, our secret faults and virtues. But they rise in arms against him who would expose the former or belittle the latter. How well I remember an occasion upon which my own dear wife had me paged in a restaurant where I was eating. She said to the waiter: 'Is Mr. Dashblank here?' 'Mr. Dashblank?' asked the waiter, 'is he that fat old man with a red nose and a bald head?'

"'Yes, that's the man,' answered my wife. 'But I want you to understand that he isn't fat and he isn't old. And he's not very bald, either. I shall report you for your insolence. His nose isn't a bit red. Get him for me at once—you evidently know him.'"

The belief more or less flippantly asserted that a joke with an Englishman takes so long to mature that the point disappears is not borne out by the following anecdote:

A queen's counsel was addressing a court and a donkey set up a bray and his lordship interrupted by saying, "One at a time, please."

When the counsel finished, the court began the delivery of an adverse decision, and the donkey set up a second bray.

Whereupon the counsel, placing a hand behind his ear—his own ear—said: "Will your lordship repeat what you said, as the echo in the room is very confusing?"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attachment**—Lodging Executions.—Where property has been attached, by a deputy sheriff, writs of attachment subsequently issued should also be placed in the same hands for execution. —Beaulieu v. Clark, Mass., 96 N. E. 319.

2. **Bankruptcy**—Concealment of Assets.—Where a bankrupt had attempted to conceal assets, he forfeited his right to discharge, though he subsequently listed the property after his attempt to conceal had been discovered.—In re Sussman, D. C., 190 Fed. 111.

3.——Discharge.—Where the only claims filed against a bankrupt are in litigation, and are disputed by him, the court has no jurisdiction to grant him a discharge.—In re Gulick, D. C., 190 Fed. 52.

4.——Domicile.—Where partners were domiciled in different districts, and the firm maintained a business establishment in each district, both bankruptcy courts had jurisdiction of bankruptcy against the firm and the individual partners.—In re Sterne & Levi, D. C., 190 Fed. 70.

5.——Equity.—Bankruptcy courts are governed by equity rules, except as otherwise expressly provided by the bankruptcy act.—In re Gilaspie, D. C., 190 Fed. 88.

6.——Estoppel.—Release of claims against a bankrupt in consideration of stock in a corporation held a bar to the claims as against an objection for want of consideration.—In re Norris, D. C., 190 Fed. 101.

7.——Practice.—On a claim of property taken as belonging to a bankrupt, the trustee in bankruptcy need not show insufficient assets in his hands to satisfy creditors when the bankrupt states in his petition that he has no assets.—In re Schoenfield, D. C., 190 Fed. 53.

8.——Practice.—Where a claim against a bankrupt was not in proper form and was allowed only for voting purposes, after which an objection thereto was filed by creditors, it was the claimant's duty to answer the objection, and on his failure to do so the claim was properly expunged under Bankruptcy Act, § 57k.—In re Goble Boat Co., D. C., 190 Fed. 92.

9.——Priority.—Bankruptcy Act, § 64b, providing for priority of payment of wages due certain servants, held to create a prior lien in their favor as against a bankrupt's assets, enforceable without reference to state statutes relating to the same subject.—In re McDavid Lumber Co., D. C., 190 Fed. 97.

10.——Provable Claim.—Where a bankrupt, three or four days before bankruptcy, had in his possession a considerable sum of money loaned to him for gambling and failed to establish the amount converted to his own use, the lenders were entitled to prove their claims to the full amount of their original loan.—In re Norris, D. C., 190 Fed. 101.

11. **Banks and Banking**—Accepted Draft.—A draft, accepted by a bank from the depositor for discount, held the property of the bank as against the depositor's creditors.—Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank, Md., 81 Atl. 294.

12. **Bills and Notes**—Forged Indorsement.—Drawee of negotiable instrument paying it to person holding it under forged indorsement held ordinarily enfitled to recover back the sum so paid.—Yatesville Banking Co. v. Fourth Nat. Bank, Ga., 72 S. E. 528.

13. **Brokers**—Contracts.—Where defendants, as brokers, contracted to sell a tract of land belonging to various owners without having written authority as to a part of the land, the purchaser was entitled to recover from defendants the difference between the option price and the price he was compelled to pay.—Tulane Educational Fund's Adm'rs. v. Baccich & De Montluzin, La., 56 So. 371.

14.——Revocation of Agency.—A contract of employment by agents to sell land, under which they incurred expense, held not revocable at the option of the owner.—McMillan v. Quincey, Ga., 72 S. E. 506.

15. **Carriers of Goods**—Insurer.—A common carrier is liable at common law as an insurer for loss caused by any cause not attributable to the act of God or public enemies.—Oregon Short Line Ry. Co v. Blyth, Wyo., 118 Pac. 649.

16.——Lien for Charges.—Shipper, who is both consignor and consignee, held not entitled to sue ex contractu for value of goods, which carrier tendered in damaged condition, but refused to deliver until charges were paid.—Wilensky v. Central of Georgia Ry. Co., Ga., 72 S. E. 516.

17.——Limiting Liability.—A carrier cannot by contract relieve himself from liability for loss resulting from his negligence.—Oregon Short Line Ry. Co. v. Blyth, Wyo., 118 Pac. 649.

18.——Negligence.—A carrier held not liable for damages to goods shipped resulting from

the shipper's negligence.—Currie v. Seaboard Air Line Ry., N. C., 72 S. E. 493.

19. **Carriers of Live Stock**—Insurer.—A carrier of live stock is an insurer except where injury results from the act of God or public enemy, or from the inherent nature of viciousness of the animals.—Louisville & N. R. Co. v. Cecil, Ky., 140 S. W. 186.

20. **Chattel Mortgages**—Possession.—A mortgagee in possession under a bill of sale in equity a mortgage held to hold in trust for the grantor after the payment of the indebtedness secured.—Kinkead v. Peet, Iowa, 132 N. W. 1095.

21. **Conspiracy**—Concert of Action.—The least degree of concert of action or collusion makes the act of one conspirator the act of all.—Ex parte Hayes, Okl., 118 Pac. 609.

22. **Constitutional Law**—Curative Statute.—Statutes validating defectively executed and acknowledged deeds and mortgages, but saving the rights of third parties acquired in good faith, are valid.—Eden Street Permanent Bldg. Ass'n. No. 1 of Baltimore City v. Lusby, Md., 81 Atl. 284.

23.——Franchise.—A ferry franchise being property cannot be revoked or taken without due process of law, which in such a case requires a direct proceeding for that purpose and upon notice; and hence the question of forfeiture cannot be raised collaterally.—Willis v. Calhoun, Ky., 140 S. W. 199.

24.——Police Power.—All property is held subject to such reasonable restraints and regulations as the state may constitutionally impose in the exercise of its police power.—Hamp v. State, Wyo., 118 Pac. 653.

25.——Statutory Grant.—Where an absolute right of repeal of a statutory grant is reserved by the granting authority, the exercise of such right is not a violation of the constitutional prohibition of impairment of the obligation of a contract.—Seattle, R. & S. Ry. Co. v. City of Seattle, C. C., 190 Fed. 75.

26. **Contracts**—Forbearance.—Forbearance on the part of a purchaser of mortgaged property from the mortgagor's grantee to sue such grantee for fraudulent representations held a good consideration for the mortgagor's promise to inee River Boom Co. v. Augustus Spies Lumbe & Cedar Co., W's., 132 N. W. 1118.

27.——Public Policy.—Contract for an act discharge the mortgage.—Gregory v. Arms, Ind., 96 N. E. 196.

28.——Public Policy.—If a sale of stock of a corporation to another corporation was contrary to statute prohibting a corporation from purchasing stock in another company, the seller cannot recover the stock or its value.—Krell-French Piano Co. v. Dengler, Ky., 140 S. W. 168.

29.——Public Policy.—An agreement between the prosecuting attorney and one charged with embezzlement to dismiss the prosecution on payment of a specified sum being invalid as contrary to public policy, a payment made cannot be recovered.—Harrison Tp. v. Addison, Ind., 96 N. E. 146.

30. **Corporations**—Amendment of Charter.—If the by-laws of a co-operative business association permitted their amendment by the written consent of two-thirds of the members filed with the secretary, the directors could not adopt by-laws without such consent.—Willis v. Lauridson, Cal., 118 Pac. 530.

31.——Authority of President.—The president of a debtor corporation cannot to the prejudice of its creditors purchase all the corporate property, and pay the consideration to the stockholders.—Mundy v. Jacques, Md., 81 Atl. 289.

32.——De Facto.—A de facto corporation can only exist where there is a law under which a de jure corporation can be created.—State v. Rutland Ry., Light & Power Co., Vt., 81 Atl. 252.

33.——Officers.—The president of a corporation cannot transfer title to goods to himself without the directors' consent, and one not an innocent purchaser from him takes nothing by his purchase from the president.—In re Schoenfield, D. C., 190 Fed. 53.

34. **Courts**—Removal of Causes.—The State Supreme Court is bound to follow decisions of the United States Supreme Court upon the question of removal of causes to the federal courts.—Haynes' Adm'rs. v. Cincinnati, N. O. & T. P. R. Co., Ky., 140 S. W. 176.

35. **Criminal Evidence**—Admissibility.—Words constituting conduct, and otherwise relevant, held admissible, notwithstanding the ordinary rule against hearsay.—Fitzgerald v. State, Ga., 72 S. E. 541.

36.——Conspiracy.—Slight evidence of collusion held all that is necessary to admit acts and declarations of conspirator in evidence against co-conspirator.—Ex parte Hayes, Okl., 118 Pac. 609.

37. **Criminal Law**—Inexperienced Attorney.—Where defendant's attorneys, appointed by the court, were inexperienced, and objected to certain evidence, which was inadmissible and prejudicial, as soon as they appreciated its incompetent character, it should have been excluded, though they failed to object at the time.—People v. Blevins, Ill., 96 N. E. 214.

38.——Pleading.—Where matters which ought to be stated in an indictment are omitted, and the excuse is given that the facts are unknown, the truthfulness of the excuse held put in issue by the plea of not guilty.—People v. Hunt, Ill., 96 N. E. 220.

39.——Pleading.—Where a misdemeanor was charged in the complaint and warrant with a videlicet, the prosecution was not confined to the exact day alleged.—People v. Stewart, Mich., 132 N. W. 1071.

40.——Similar Circumstances.—In a prosecution for mule theft, evidence that defendant had previously stolen other animals in a substantially similar manner held admissible to show intent.—Melton v. State, Tex., 140 S. W. 230.

41. **Criminal Trial**—Former Jeopardy.—A plea of former jeopardy cannot be predicated on a previous trial of defendant under a void accusation.—Renfroe v. State, Ga., 72 S. E. 520.

42. **Deeds**—Consideration.—Voluntary conveyances to children and grandchildren of a grantor requires no valuable consideration to render them binding on the grantor.—Spencer v. Razor, Ill., 96 N. E. 300.

43.——Repugnancy.—Where there is repugnancy between the granting clause and the habendum of a deed, the granting clause held to prevail.—Morton v. Babb, Ill., 96 N. E. 279.

44. **Disorderly House**—Evidence.—Knowledge by innkeeper of lewd practices by women stopping at his inn may be shown by general reputation of the house.—Fitzgerald v. State, Ga., 72 S. E. 541.

45. **Divorce**—Custody of Children.—Jurisdiction in a divorce suit to adjudicate custody of minor children held continuing.—Dyer v. Dyer, Wash., 118 Pac. 634.

46.——Modification of Decree.—Court, awarding judgment for alimony, held to have authority to modify the judgment on application of either party.—Haskell v. Haskell, Minn., 132 N. W. 1129.

47.——Mutual Misconduct.—In a suit for divorce, findings of miconduct on the part of both parties held to justify the denial of a divorce to either.—Mayr v. Mayr, Cal., 118 Pac. 546.

48. **Easements**—Right to Grant.—That defendant's predecessor did not have record title to land when he agreed that a drain might be maintained over it held not to affect the right of maintenance.—Hatton v. Cale, Iowa, 132 N. W. 1101.

49. **Eminent Domain**—Public Waters.—The supervision and control of the appropriation and distribution of the public waters of the state by administrative officers pursuant to statute held not to invade any rights of private property or take it for public or private use without compensation contrary to the Constitution.—Hamp v. State, Wyo., 118 Pac. 653.

50. **Escrows**—Wrongful Delivery.—Where a deed was delivered by a depositary to a person other than the one to whom the grantor intended to convey, an innocent purchaser from the one to whom the deed was delivered acquired no title.—Forcum v. Brown, Ill., 96 N. E. 259.

51. **Estoppel**—Silence.—A person remaining silent held estopped to assert the facts when to do so will work a fraud on the innocent party who relies on the appearance of the situation.—Farber v. Page & Mott Lumber Co., Idaho, 118 Pac. 664.

52. **Evidence**—Admissibility.—An agreement between grantor and grantee, made at or before the execution of a deed, as to the payment of incumbrances, though not expressed in deed, may be proven by parol.—Gregory v. Arms, Ind., 96 N. E. 196.

53.——Admissibility.—Primary evidence held not to be excluded because other corroborative or stronger and more conclusive evidence might have been introduced.—City of Williamsport v. Citizens' Water & Gas Co., Pa., 81 Atl. 316.

54.——Parol Evidence.—The rule that parol evidence is inadmissible to vary a written contract only applies to such contracts as have been finally executed and delivered as a complete contract.—American Sales Book Co. v. Whitaker, Ark., 140 S. W. 132.

55. **Frauds, Statute of**—Executed Agreement.—An executed agreement to permit maintenance of a ditch over land to drain it and lands of the other party is not within the statute of frauds.—Hatton v. Cale, Iowa, 132 N. W. 1101.

56.——Parol Contract.—On the recovery of the possession of land from one in possession under a parol contract to sell, the possessor cannot be charged with rent on his improvements, but only with rent after the beginning of the action on the property, considered without improvements.—Padgett v. Decker, Ky., 140 S. W. 152.

57.——Promise to Answer For Debt of Another.—Promise of the mortgagor to a purchaser of his grantee to discharge of the mortgage held not within the statute of frauds.—Gregory v. Arms, Ind., 96 N. E. 196.

58.——Written Contract.—Where the president of an insurance company signed his name on the face of a policy, with his name printed under an indorsement on the back, he made the whole policy the contract of the company within the statute of frauds.—Equitable Life Assur. Society of United States v. Meuth, Ky., 140 S. W. 157.

59. **Habeas Corpus**—Actual Custody.—A writ of habeas corpus will not lie to release a person not in actual custody.—Ex parte Smith, Okl., 118 Pac. 590.

60.——Jurisdiction.—Where petitioner is imprisoned under judgment of a court without jurisdiction, the want of jurisdiction is ground for release on habeas corpus.—Ex parte McClure, Okl., 118 Pac. 591.

61. **Homicide**—Shooting Into Mob.—One whose premises are invaded by a mob, and who shoots into the mob and wounds one of its members, held not guilty of assault with intent to murder.—Rhodes v. State, Ga., 72 S. E. 518.

62. **Homestead**—Joinder in Deed.—A wife held not bound by recitals in deeds of sale and resale of a homestead between her husband and a creditor, in which she did not join, as provided by Const. 1898, art. 246.—Underwood v. Flosheim Bros. Dry Goods Co., La., 56 So. 364.

63.——Protecting Child.—The right of a parent to protect a daughter from seduction exists, if done in protection against intended wrong, and not in punishment for past injury.—Brown v. State, Ga., 72 S. E. 537.

64. **Indemnity**—Pari Delicto.—Where the death of a third person was caused by the concurrent negligence of plaintiff city and defendant, a judgment having been recovered against the city, both were in pari delicto, and the city could not recover over against defendant.—City of Tacoma v. Bonnell, Wash., 118 Pac. 642.

65. **Indictment and Information**—Practice.—A motion to direct a verdict cannot be made to take the place of a motion to quash the indictment, or used to test the sufficiency of the indictment.—State v. Cameron, Ind., 96 N. E. 150.

66.——Variance.—There was no fatal variance between allegation of alteration of a receipt executed by "Jos." H. R. and proof that the receipt was executed by "Joseph" H. R.—State v. Whiteneck, Ind., 96 N. E. 156.

67. **Injunction**—Condition of Granting.—To authorize an injunction, the right thereto should be clear, and the alleged injury be imminent, and such that it can only be avoided by the in-

junction.—Willis v. Lauridson, Cal., 118 Pac. 530.

68. **Insurance**—Construction.—If two parts of a contract of insurance are inconsistent or the contract is doubtful, that one will be adopted which is more favorable to the assured.—Supreme Council Catholic Benev. Legion v. Grove, Ind., 96 N. E. 159.

69.——Estoppel on Insured.—Where the application is contained in a policy, it is the duty of insured to know that the representations contained therein are true.—Bonewell v. North American Accident Ins. Co., Mich., 132 N. W. 1067.

70. **Intoxicating Liquors**—Principal and Agent.—An agent who negotiates for his principal a sale of beer to a minor is equally guilty with the principal.—Hardu v. State, Ga., 72 S. E. 513.

71. **Judgment**—Res Judicata.—Where a substantial right or the merits of a case are involved and determined, the judgment is res adjudicata, though made on appeal from an order entered on a motion.—Lake v. Bonynge, Cal., 118 Pac. 535.

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